

JUN 17 1996

In The
Supreme Court of the United States

October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR
STANDARDS ENFORCEMENT, DIVISION OF
APPRENTICESHIP STANDARDS, DEPARTMENT OF
INDUSTRIAL RELATIONS, COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC.;
MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONERS

JOHN M. REA, Chief Counsel
(Counsel of Record)
VANESSA L. HOLTON
Asst. Chief Counsel
FRED D. LONSDALE, Sr. Counsel
JAMES D. FISHER, Counsel
SARAH COHEN, Counsel

State of California
Department of Industrial
Relations
Office of the Director
Legal Unit
45 Fremont Street, Suite 450
San Francisco, CA 94105

(Mailing Address:
P.O. Box 420603
San Francisco, CA 94142)
(415) 972-8900

*Counsel for State Petitioners
Department of Industrial
Relations Division of
Apprenticeship Standards*

H. THOMAS CADELL, JR.
Chief Counsel
RAMON YUEN-GARCIA
Counsel

State of California
Division of Labor
Standards Enforcement
45 Fremont Street,
Suite 3220
San Francisco, CA 94105

(Mailing Address:
P.O. Box 420603
San Francisco, CA 94142)
(415) 975-2060

*Counsel for State
Petitioners Division of
Labor Standards
Enforcement and County
of Sonoma*

62 Pp

QUESTION PRESENTED

Whether Congress intended, in enacting the Employee Retirement Income Security Act, to preempt states' traditional regulation of wages, apprenticeship and state-funded public works construction when that regulation is expressed in a state prevailing wage law that restricts contractors' payment of lower apprentice-specific wages to apprentices duly registered in programs approved as meeting federal standards.

TABLE OF CONTENTS

	Page(s)
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iv
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTES INVOLVED.....	1
STATEMENT OF THE CASE.....	2
I. The Traditional State Role Through The End Of The Craft Era Was To Enforce The Prede- cessor Of The Modern Apprentice's "Written Agreement."	2
II. Prevailing Wage Laws Accommodate Contrac- tors' Use Of Apprentices By Defining An Apprentice Before A Public Work Begins And Offering An Apprentice Wage Below Craft Journey Rates	7
III. Workers Who Were Not Registered Appren- tices Were Paid Wages Below The Journey Level, In This Case	13
IV. Proceedings Below	15
SUMMARY OF ARGUMENT.....	18
ARGUMENT	20
I. ERISA Does Not Preempt California's Ability To Restrict Apprentice Wages To Registered Apprentices Because, Under <i>Travelers</i> , Califor- nia's Law Does Not Relate To ERISA Plans ...	21
A. <i>Travelers</i> Provides The Analytical Frame- work For Approaching The "Unhelpful Text" Of ERISA	21

TABLE OF CONTENTS - Continued

	Page(s)
B. California's Law Involves Areas Of Traditional State Regulation And Warrants The Strongest Presumption Against Preemption.....	23
C. California's Law Does Not Reference ERISA Plans.....	29
D. This Law Has A Permissible Purpose And Effect Which Congress Did Not Intend To Preempt.....	32
E. Congress' Purpose For ERISA Suggests Posi- tive Reasons Why States Should Retain The Ability To Recognize "Registered" Appren- tices.....	35
F. The Indirect Effect That Section 1777.5 Has On ERISA-Covered Apprenticeship Program Does Not Force Any Particular Plan Struc- ture.....	37
II. The ERISA Federal Savings Clause Protects Cali- fornia's Law Which Carries Out The Goals Of The Federal-State Apprenticeship Scheme Under The Fitzgerald Act.....	40
CONCLUSION	50

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Alessi v. Raybestos-Manhattan Inc.</i> , 451 U.S. 504 (1981)	41
<i>Associated General Contractors v. Smith</i> , 74 F.3d 926 (9th Cir. 1996)	30
<i>Bldg. and Const. Trades' Dept., AFL-CIO v. Donovan</i> , 712 F.2d 611 (D.C. Cir. 1983), cert. denied, 464 U.S. 1069 (1984)	11, 39
<i>Connally v. Gen. Construction Co.</i> , 269 U.S. 385 (1926)	10
<i>Dillingham Construction Co. v. County of Sonoma, et al.</i> , 57 F.3d 712 (9th Cir. 1995)	1
<i>Dillingham Construction Co. v. County of Sonoma, et al.</i> , 778 F. Supp. 1522 (N.D. Cal. 1991)	1
<i>District of Columbia v. Greater Washington Board of Trade</i> , 506 U.S. 125 (1992)	29, 30
<i>Electrical Joint Apprenticeship Comm. v. MacDonald</i> , 949 F.2d 270 (9th Cir. 1991), cert. denied, 505 U.S. 1204 (1992)	30
<i>Fort Halifax Packing Co., Inc. v. Coyne</i> , 482 U.S. 1 (1987)	16
<i>Ingersoll-Rand Co. v. McClendon</i> , 498 U.S. 133 (1990)	29, 30
<i>Lusardi Const. Co. v. Aubry</i> , 1 Cal. 4th 976, 4 Cal. Rptr. 2d 837 (1992)	7
<i>Mackey v. Lanier Collection Agency & Services, Inc.</i> , 486 U.S. 825 (1988)	22, 29, 30
<i>Massachusetts v. Morash</i> , 490 U.S. 107 (1989) ..	21, 23, 36

TABLE OF AUTHORITIES - Continued

	Page(s)
<i>Metropolitan Life Insurance Co. v. Massachusetts</i> , 471 U.S. 724 (1985)	16
<i>Metropolitan Water District v. Whitsett</i> , 215 Cal. 400, 10 P.2d 751 (1932)	10
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992)	40
<i>New York State Conference of Blue Cross and Blue Shield, et al. v. Travelers</i> , 115 S. Ct. 1671 (1995)	passim
<i>O.G. Sansone Co. v. Dept. of Transportation</i> , 55 Cal. App. 3d 434, 127 Cal. Rptr. 799 (1976)	8
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	21
<i>In Re Schlein</i> , 8 F.3d 745 (11th Cir. 1993)	49
<i>Shaw v. Delta Airlines</i> , 463 U.S. 85 (1983)	42, 43
<i>Southern California ABC v. California Apprenticeship Council</i> , 4 Cal. 4th 422, 14 Cal. Rptr. 491 (1992)	31
<i>Thiokol Corp., Morton International, Inc. v. Roberts</i> , 76 F.3d 751 (6th Cir. 1996)	38
<i>W.W. Atkin v. State of Kansas</i> , 191 U.S. 207 (1903)	23
FEDERAL STATUTES	
Adult Education Act	
20 U.S.C. § 1211(b) (1994)	33
20 U.S.C. § 1211(c) (1994)	33
20 U.S.C. § 1211(e) (1994)	33

TABLE OF AUTHORITIES - Continued

Page(s)

Carl D. Perkins Vocational Education Act and the Applied Technology Act Amendments of 1990	
20 U.S.C. § 2301 (1994)	33
20 U.S.C. § 2323 (1994)	33
20 U.S.C. § 2471 (1994)	33
School to Work Opportunities Act	
20 U.S.C. § 6101 (1994)	33
20 U.S.C. § 6103(13) (1994).....	33
20 U.S.C. § 6103(14) (1994).....	33
20 U.S.C. § 6123 (1994)	33
20 U.S.C. § 6143 (1994)	33
20 U.S.C. § 6145 (1994)	33
Federal Rules of Civil Procedure	
28 U.S.C. § 1254(l) (1994)	1
National Apprenticeship Act	
29 U.S.C. § 50 (1994)	1, 8
National Labor Relations Act	
29 U.S.C. §§ 151 <i>et seq.</i> (1994).....	16
Fair Labor Standards Act	
29 U.S.C. §§ 201-218 (1994)	5
Employee Retirement Income Security Act	
29 U.S.C. §§ 1001 <i>et seq.</i> (1994)	2
29 U.S.C. § 1144(a) (1994).....	1, 16, 40
29 U.S.C. § 1144(d) (1994)	1, 17, 40

TABLE OF AUTHORITIES - Continued

Page(s)

Job Training Partnership Act	
29 U.S.C. §§ 1501 <i>et seq.</i> (1994)	33
Training and Rehabilitation for Veterans with Service- Connected Disabilities	
38 U.S.C. § 3108 (1994)	33
38 U.S.C. § 3452(e) (1994).....	33
38 U.S.C. § 3687 (1994)	48
Davis-Bacon Act	
40 U.S.C. § 276a (1994)	10
40 U.S.C. §§ 276a to 276a-5 (1994)	8
Civil Rights Act	
42 U.S.C. 2000e <i>et seq.</i> (1994).....	42
FEDERAL REGULATIONS	
25 C.F.R. § 27.8 (1995)	33
29 C.F.R. § 5.2(n)(1) (1995).....	9
29 C.F.R. § 5.5(a)(4) (1995)	9, 39
29 C.F.R. § 29.1(b) (1995)	41
29 C.F.R. § 29.2(e) (1995).....	6
29 C.F.R. § 29.2(f) (1995).....	8
29 C.F.R. § 29.5 (1995)	31
29 C.F.R. § 29.5(b)(4) (1995).....	14

TABLE OF AUTHORITIES - Continued

	Page(s)
29 C.F.R. § 29.5(b)(5) (1995).....	8
29 C.F.R. § 29.5(b)(9) (1995).....	45
29 C.F.R. § 29.5(b)(11) (1995).....	6
29 C.F.R. § 29.5(b)(18) (1995).....	6
29 C.F.R. § 29.12 (1995).....	9
29 C.F.R. § 29.12(b)(8) (1995).....	37
29 C.F.R. § 521.1 (1938).....	6
29 C.F.R. §§ 521.1 to 521.11 (1995).....	35
29 C.F.R. §§ 521.1 to 521.90 (1938).....	5
29 C.F.R. § 2510.3-1(b) (1995).....	31
29 C.F.R. § 2510.3-1(b)(3)(iv) (1995).....	31
29 C.F.R. § 2510.3-1(k) (1995).....	31
CALIFORNIA STATUTES	
CAL. EDUC. CODE § 8150-8156 (West 1994 and Supp. 1996).....	15
CAL. LAB. CODE § 1771 (West 1989).....	14
CAL. LAB. CODE § 1773 (West 1989).....	10
CAL. LAB. CODE § 1777.5 (West Supp. 1996).....	<i>passim</i>
CAL. LAB. CODE § 1777.7(e) (West 1996).....	12
CAL. LAB. CODE §§ 3070 <i>et seq.</i> (West 1989 and Supp. 1996).....	9, 12
CAL. LAB. CODE § 3071 (West 1989).....	9

TABLE OF AUTHORITIES - Continued

	Page(s)
CAL. LAB. CODE § 3074 (West 1989).....	14
CAL. LAB. CODE § 3074.3 (West 1989).....	14
CAL. LAB. CODE § 3077 (West 1989).....	9, 30
1937 Cal. Stat. 872.....	11
1939 Cal. Stat. 220.....	12
1939 Cal. Stat. 971.....	11
1995 Cal. Stat. 303.....	15
CALIFORNIA REGULATIONS	
CAL. CODE REGS. tit. 8, § 205(e) (1995).....	8
CAL. CODE REGS. tit. 8, § 205(f) (1995).....	31
CAL. CODE REGS. tit. 8, § 208(b) (1995).....	8
CAL. CODE REGS. tit. 8, § 212(a)(3) (1995).....	14
CAL. CODE REGS. tit. 8, § 212(c)(7) (1995).....	8
CAL. CODE REGS. tit. 8, § 228(c) (1995).....	12
CAL. CODE REGS. tit. 8, § 230.1 (1995).....	13
CAL. CODE REGS. tit. 8, § 230.1(a) (1995).....	12
CAL. CODE REGS. tit. 8, § 230.1(b) (1995).....	13

TABLE OF AUTHORITIES - Continued

Page(s)

OTHER AUTHORITIES

<i>Education Goals and Standards: Examining the Need to Improve National Education and Job Training Opportunities Before the Senate Comm. on Human Resources</i> , 103d Cong., 1st Sess. (1993)	48
<i>To Safeguard the Welfare of Apprentices: Hearings on H.R. 6205 Before a Subcomm. of the Comm. on Labor, House of Representatives</i> , 75th Cong., 1st Sess. (1937).....	5
H.R. 1617, 104th Cong., 1st Sess. § 5, 107(f)(H) (1995)	48
H.R. 1617, 104th Cong., 1st Sess. § 5, 110(p)(3)(E) (1995)	48
H.R. 1617, 104th Cong., 1st Sess. § 5, 241(c)(6) (1995)	48
H.R. 1617, 104th Cong., 1st Sess. § 5, 323(b)(3)(A)(II) (1995).....	48
120 CONG. REC. 29,197 (1974)	34
Fair Labor Standards Act, ch. 676, 52 Stat. 1060 (1938)	5
39 Fed. Reg. 422 (1974)	21
40 Fed. Reg. 24,643 (1995)	31
ERISA Advisory Opinion No. 76-01	31
ERISA Advisory Opinion No. 83-32A	31
1 GRACE ABBOTT, <i>THE CHILD AND THE STATE</i> (1938)	3, 6, 26

TABLE OF AUTHORITIES - Continued

Page(s)

JAMES ACRET, <i>CALIFORNIA CONSTRUCTION LAW MANUAL</i> (4th ed. 1990)	44
CENTER FOR STUDIES IN VOCATIONAL AND TECHNICAL EDUCATION, <i>RESEARCH IN APPRENTICESHIP TRAINING</i> (1967)	31
DANAHER, <i>APPRENTICESHIP PRACTICE IN THE UNITED STATES</i> (Graduate School of Business, Stanford University, Business Research Series No. 3) (1945)	26
O.J. DUNLOP AND R.C. DENMAN, <i>ENGLISH APPRENTICESHIP AND CHILD LABOR</i> (1912).....	3
GAO, <i>APPRENTICESHIP TRAINING ADMINISTRATION, USE, AND EQUAL OPPORTUNITY</i> (1992)	46
STEWART SCRIMSHAW, <i>APPRENTICESHIP: PRINCIPLES, RELATIONSHIPS, PROCEDURES</i> (1932)	3, 4
WILLIAM F. PATTERSON AND M.H. HEDGES, <i>EDUCATING FOR INDUSTRY: POLICIES AND PROCEDURES OF A NATIONAL APPRENTICESHIP SYSTEM</i> (1946)	4, 10, 26, 28, 29, 33
W.J. RORABAUGH, <i>THE CRAFT APPRENTICE: FROM FRANKLIN TO THE MACHINE AGE IN AMERICA</i> (1986)	2
1 WITKIN, <i>SUMMARY OF CALIFORNIA LAW</i> § 79 (9th ed. 1987 and Supp. 1995).....	7
GILBERT AND SULLIVAN, <i>PIRATES OF PENZANCE</i> (1880).....	28

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 57 F.3d 712 (9th Cir. 1995) and is reprinted in the appendix to the Petition for Writ of Certiorari ("Pet. App.") at Pet. App. 1-22. The order of the Court of Appeals denying California's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted at Pet. App. 53-54. The opinion of the United States District Court for the Northern District of California granting California's Motion for Summary Judgment is reported at 778 F. Supp. 1522 (N.D. Cal. 1991) and is reprinted at Pet. App. 23-52.

JURISDICTION

The Ninth Circuit issued its decision and judgment on June 7, 1995. After denial of a Petition for Rehearing and Suggestion for Rehearing En Banc, Pet. App. 53-54, and an extension of time to file a Petition for Writ of Certiorari ("Cert. Pet."), certiorari was granted on April 15, 1996. This Court has jurisdiction under 28 U.S.C. § 1254(l) (1994).

STATUTES INVOLVED

The relevant federal statutory provisions are sections 514(a) and (d), 29 U.S.C. §§ 1144(a) and 1144(d) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* (1994), and the National Apprenticeship ("Fitzgerald") Act, 29 U.S.C. § 50 (1994). The relevant California statutory provision is

California Labor Code section 1777.5 (West Supp. 1996). The relevant statutes are reproduced at Pet. App. 55-63.

STATEMENT OF THE CASE

This case concerns the question of whether California may, consistent with the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* (1994), continue its long-time practice of limiting an apprentice wage on state funded public works to those workers who are registered apprentices in approved apprenticeship programs. Although apprenticeship has existed in America since colonial times, this Court has had little occasion to adjudicate issues concerning this venerable institution. Because this is not an area the Court has frequented, some background on the legal status of apprenticeship is useful in understanding the context of this action.

I. The Traditional State Role Through The End Of The Craft Era Was To Enforce The Predecessor Of The Modern Apprentice's "Written Agreement."

Although under common law, the traditional contractual relationship between master and apprentice was personal and bilateral, some terms of that relationship, unlike other private arrangements, became regulated by public law early in English legal history. The English Statute of Artificers (1563) addressed the length of an apprenticeship, setting it at seven years. W.J. RORABAUGH, *THE CRAFT APPRENTICE: FROM FRANKLIN TO THE MACHINE AGE IN AMERICA* 4 (1986). English apprenticeship thereafter moved from a relationship between parent and master

based on private custom to a public or quasi-public affair falling under the control of municipal authorities or guilds. O.J. DUNLOP AND R.C. DENMAN, *ENGLISH APPRENTICESHIP AND CHILD LABOR* 30 (1912). Inheriting this craft apprenticeship tradition with the common law, the colonies, and later the states, enforced the apprentice's obligation to serve the indentured time, as well as the master's obligation to train, care for, and protect the apprentice. 1 GRACE ABBOTT, *THE CHILD AND THE STATE* 216-18 (1938).

In the first decades of this century, apprenticeship evolved away from a private, albeit state-regulated, two-sided master-apprentice relationship. The apprentice no longer subsisted in the quarters of his master but lived as an independent and mobile wage-earner, with the schedule of skills he was to learn being specified by trade-associations rather than individual masters, and with a role for public authority, limited mainly to that of providing classroom instruction in the theory of the trade. STEWART SCRIMSHAW, *APPRENTICESHIP: PRINCIPLES, RELATIONSHIPS, PROCEDURES* 8 (table) (1932). With industrialization, the states began to realize that in a system lacking individual masters, neither employer nor potential apprentice could assess whether apprentices were acquiring the needed skills. While greater employer investment in labor skills was needed as industrialization demanded higher skills, labor mobility hampered that investment. A single employer could not follow each apprentice's progress to be sure all necessary skills were learned. *Id.* at 66-67 (discussing difficulties among construction employers in interchange).

The newly mobile potential apprentice, on the other hand, was faced with problems as well: There was no

protection against placement of "apprentices" in dead end, low-wage jobs that did not deliver training, nor was there any assurance that training would include the theory, as well as the manual skills, necessary to produce a fully trained mechanic.¹ Both employer and apprentice concerns could be met if involved employers worked through their trade associations to formulate standards of apprenticeship in cooperation with both organized labor and public authorities.² Such standards would include uniform wage scales and the "necessary related science of the trade," as well as certification by means of a diploma. SCRIMSHAW, *supra*, at 63.

The remedies for these labor market difficulties produced a change in the state role in the 1920's. The states were joined and encouraged by the federal government in the 1930's in defining an apprentice and protecting apprenticeship opportunities.

The need to create a federal definition of an apprentice arose when the federal government attempted to

¹ One commentator at the time labeled the first form of misuse of apprenticeship "exploitation" and the second "fake" apprenticeship. SCRIMSHAW, *supra*, at 149, 152.

² An inherent problem with placing the full responsibility of apprenticeship on the private sector is the long period of training required. Both varying levels of interest in cooperative endeavors within industry and fluctuations in market cycles make it hard to ensure completion of an extended training experience. See SCRIMSHAW, *supra*, at 43 (the "opportunistic" employer responds to spot shortages) and WILLIAM F. PATTERSON AND M.H. HEDGES, EDUCATING FOR INDUSTRY: POLICIES AND PROCEDURES OF A NATIONAL APPRENTICESHIP SYSTEM 111 (1946) (industry-only schools are "lavish" in good times, but vulnerable when business goes down).

create minimum wage laws through the private industry codes of the National Recovery Act ("N.R.A."). *To Safeguard the Welfare of Apprentices: Hearings on H.R. 6205 Before a Subcomm. of the Comm. on Labor, House of Representatives, 75th Cong., 1st Sess. 3* (1937) (testimony of Beyer) [hereinafter "*Safeguard*"]. These codes established a minimum wage, but the codes failed to establish an exemption from the minimum wage laws for apprentices. *Id.* The Federal Committee on Apprenticeship ("Committee") was established in June 1934, in part, to create a definition of an apprentice in order to prevent employees from being used merely as a source of "cheap labor." *Id.* at 47 (Report of the Federal Committee on Apprentice Training). The Committee's definition of a "bona fide" apprentice included the requirement that agreements between an employer and an apprentice be approved by the state committee on apprenticeship. *Id.* State apprenticeship committees established under the N.R.A. would be responsible for applying the federal Committee's rules and regulations. *Id.*

In 1938, Congress enacted the Fair Labor Standards Act ("FLSA"), ch. 676, 52 Stat. 1060 (1938) (current version at 29 U.S.C. §§ 201-218 (1994)), requiring the payment of a minimum wage to most workers. In that same year, the Department of Labor, under the authority of section 14 of the FLSA, promulgated regulations that specified the conditions under which an apprentice could be exempted from the minimum wage requirements of the FLSA. 29 C.F.R. §§ 521.1-521.90 (1938). These regulations defined an apprentice as a worker registered under approved substantive standards:

[A] person at least 16 years of age who is covered by a written agreement with an employer, or with an association of employers, which apprenticeship agreement (1) has been *approved by the State Apprenticeship Council* or other established authority of the State, or if none such exists, by the Federal Committee on Apprenticeships, and (2) provides for not less than 4,000 hours of reasonably continuous employment for such person, for his participation in an *approved schedule of work experience through employment and at least 144 hours per year of related supplemental instruction.*

29 C.F.R. § 521.1 (1938)³ (emphasis added).

This evolution occurred during the same period that a second legal development relevant to this case, enactment of prevailing wage laws, was taking hold.

³ This definition of "apprentice" is virtually identical to the definition of apprentice published in 1937 by the Federal Committee on Apprenticeship, with the endorsement of the Department of Labor, prescribing "Suggested Language for a State Apprenticeship Law." *ABBOTT, supra*, at 251, reprinting the text of the suggested law.

The current regulations define an apprentice consistent with this original definition by providing that he or she be employed "under standards of apprenticeship fulfilling the requirements of § 29.5." 29 C.F.R. § 29.2(e) (1995), *Pet. App.* 65.

The reference to "standards of apprenticeship" defines the organized written plan embodying the terms and conditions of employment, training, and supervision (detailed in 22 subparts), which include the familiar elements of a written agreement as required by state law incorporating standards, § 29.5(b)(11) (1995), and the registration of agreements, § 29.5(b)(18) (1995). *Pet. App.* 72-75.

II. Prevailing Wage Laws Accommodate Contractors' Use of Apprentices By Defining An Apprentice Before A Public Work Begins And Offering An Apprentice Wage Below Craft Journey Rates.

The broad establishment of prevailing wage and other minimum wage laws occurred contemporaneously with the change in the governmental role in promoting apprenticeship. With the enactment of statutory minimum wage provisions came the recognition that unless wage laws were structured to recognize the particular wage practices common in apprenticeship agreements, employers could be discouraged for economic reasons from providing the on-the-job training opportunities essential to apprenticeship. (*See, supra*, pp. 5-6.)

The so-called prevailing wage laws are analogous to minimum wage laws in many respects, but are applicable to governmental projects and endeavor to replicate private wage rates on public projects. Underlying prevailing wage laws is the general principle that public construction contracts be awarded to the lowest bidder. 1 WITKIN, SUMMARY OF CALIFORNIA LAW § 79 (9th ed. 1987 and Supp. 1995). By requiring employers entering into such contracts to observe, as a minimum, the wages prevailing in the locality of the construction for each particular kind of worker, the prevailing wage laws prevent contractors from lowering labor standards and engaging in unfair wage competition in order to submit the lowest bid. At the same time, the quality of work on governmental projects is preserved by assuring that contractors do not hire substandard workers who cannot command the prevailing wage and are willing to work for less. *Lusardi Const. Co. v. Aubry*, 1 Cal. 4th 976, 4 Cal. Rptr. 2d 837 (1992).

The federal Davis-Bacon Act, 40 U.S.C. §§ 276a to 276a-5 (1994), for example, passed in 1931, sets the minimum wages that must be paid on federal public works projects as the wages paid for similar workers on private construction jobs. In 1931, California passed a similar law, modeled on the Davis-Bacon Act, *O.G. Sansone Co. v. Dept. of Transportation*, 55 Cal. App. 3d 434, 458 n.4 and accompanying text, 127 Cal. Rptr. 799 (1976), which established on a trade-by-trade basis the wages that must be paid to workers on public works projects funded by the state.

Both the Davis-Bacon Act and the California prevailing wage law allow a wage for registered apprentices in apprenticeship programs approved as meeting the standards of the National Apprenticeship ("Fitzgerald") Act, 29 U.S.C. § 50 (1994), different from that applicable to fully-qualified journey-level workers. See 29 C.F.R. § 29.2(f) (1995) (federal definition of apprenticeship program), Pet. App. 65; CAL. CODE REGS. tit. 8, § 205(e) (1995) (California counterpart). Under both the Davis-Bacon Act and the California law, the specific prevailing wage for apprentices is set at less than that for fully trained workers in the trade, and varies with the apprentices' level of progress through the multi-year apprenticeship program. See 29 C.F.R. § 29.5(b)(5) (1995), Pet. App. 73; CAL. CODE REGS. tit. 8, §§ 208(b), 212(c)(7) (1995); CAL. LAB. CODE § 1777.5 (West Supp. 1996), Pet. App. 58-63.

Like the minimum wage laws, neither federal nor state prevailing wage laws leave the issue of determining which workers may be paid at the apprentice wage rate to a case-by-case, or post hoc, decision. Under the Davis-Bacon Act, only workers in a bona fide apprenticeship program registered with the "State Apprenticeship

Agency" or the federal Bureau of Apprenticeship and Training ("BAT") are deemed "apprentices." 29 C.F.R. § 5.2(n)(1) (1995). Under regulations covering required Davis-Bacon contract clauses, "[a]pprentices will be permitted to work at less than the predetermined rate when they are employed pursuant to and individually registered in a bona fide apprenticeship program . . ." under the registration requirement defined above. 29 C.F.R. § 5.5(a)(4) (1995).

California's prevailing wage law apprentice wage provisions are similar. CAL. LAB. CODE § 1777.5 (West Supp. 1996). "Apprentices" are defined by characteristics particular to the worker ("training under apprenticeship standards and written apprentice agreements") and, secondarily, by state approval of the training and skill development that is provided the apprentice. Specifically, apprentices are to be "registered," and the standards and agreements covering them while registered are to provide for a commitment to a minimum term of employment, education, and "participation in an approved program of training." CAL. LAB. CODE § 3077 (West 1989). The California Apprenticeship Council ("CAC") is authorized to approve apprenticeship standards, CAL. LAB. CODE § 3071 (West 1989), a term synonymous with "approved program of training." CAL. LAB. CODE § 3077 (West 1989). The CAC is the "State Apprenticeship Agency" recognized by the federal BAT as the body with authority to approve apprenticeship programs in California pursuant to federal standards and for federal purposes, including the Davis-Bacon Act. 29 C.F.R. § 29.12 (1995), Pet. App. 84-89.

These special provisions of the prevailing wage law define an apprentice for prevailing wage purposes. This

definition serves both legal doctrinal imperatives and practical concerns.

The first state laws requiring contractors on public works to pay wages equivalent to those prevalent in the private market were declared unconstitutional because contractors could not determine with any precision their wage obligations in advance of bidding. *Connally v. Gen. Construction Co.*, 269 U.S. 385, 393-394 (1926). The Davis-Bacon Act, and California's law modeled on that Act, were designed to avoid these constitutional problems by determining minimum wage rates with specificity before the contractor is obliged to observe them, tying those rates to "corresponding classes of laborers and mechanics," Davis-Bacon Act, 40 U.S.C. § 276a (1994), or "craft, classification or type of workman." CAL. LAB. CODE § 1773 (West 1989).⁴

Setting wage rates for apprentices as a "type of workman" presents special difficulties. Apprentices fall between skilled and unskilled workers, and "[p]art of apprentices' remuneration is the coaching and varied experiences received." WILLIAM F. PATTERSON AND M.H. HEDGES, *EDUCATING FOR INDUSTRY: POLICIES AND PROCEDURES OF A NATIONAL APPRENTICESHIP SYSTEM* 81 (1946). Additionally, "predetermination" of the apprenticeship wage for the duration of the public project is difficult because a central part of apprenticeship is prompt escalation in wages as skill levels progress. *Id.* at 81. At the same time, without some effort to define with precision the "type of

⁴ See, e.g., *Metropolitan Water District v. Whitsett*, 215 Cal. 400, 10 P.2d 751 (1932).

workman" who can be paid as an apprentice and to designate the wages such a worker is to be paid, the prevailing wage law as a whole, dependent as it is upon tying wage rates to particular classes of workers, becomes a nullity: Any "apprentice" classification could then be used as a residual class for workers to whom the employer chooses to pay less than the determined prevailing wage for his or her craft. Cf. *Bldg. and Const. Trades' Dept., AFL-CIO v. Donovan*, 712 F.2d 611, 626-629, (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984) (discussing difficulties with Davis-Bacon "helper" classification if undefined).

In response to these legal and practical realities, the California prevailing wage laws, like the early federal minimum wage and prevailing wage provisions (see, *supra*, pp. 5-6, 8-9), provided a definition of "apprentice" applicable across crafts and trades, and provided that "apprentice" wages could be determined incrementally, according to preset methods, as each apprentice progressed through his or her craft program.

The initial version of the prevailing wage provision at issue here, 1937 Cal. Stat. 872 at 2424, provided simply that "every such apprentice shall be indentured to the contractor doing the work and shall be steadily employed by him, shall be paid the standard wage paid to apprentices under the regulations of the trade" Two years later, however, the California provision governing the wages paid apprentices on public works projects was revised. 1939 Cal. Stat. 971.

What had intervened to cause the legislature to amend California's apprenticeship law was the passage

of the 1937 Fitzgerald Act, followed by passage of California's first comprehensive apprenticeship law, known as the Shelley-Maloney Apprentice Labor Standards Act of 1939. 1939 Cal. Stat. 220 (current version at CAL. LAB. CODE §§ 3070 *et seq.* (West 1989 and Supp. 1996)). The changes to the prevailing wage apprenticeship provision substituted "written agreement" for "indenture," and specified that the agreements should be under the comprehensive statute for program standard approval and apprentice registration, the Shelley-Maloney Act ("Chapter 4 . . . of Division 3" of the Labor Code) as cross-referenced in the present statute.⁵ Pet. App. 58.

⁵ CAL. LAB. CODE § 1777.5 (West Supp. 1996) is not enforced precisely as it appears in the California statutes because of partial invalidation in respects not here pertinent, and because the CAC has exercised its express authority under CAL. LAB. CODE § 1777.7(e) (West 1996) to promulgate interpretive rules in order to determine the appropriate application of the provision in light of that invalidation. None of these court or administrative actions, however, change the definition of an apprentice which is at the heart of this case.

In particular, the statute and the regulations define apprentice in a way that does not distinguish between apprentices registered in different types of apprenticeship programs – unilateral, employer-only or joint, union-management programs; multi-employer or single employer programs; or programs financed through employers' general funds rather than funded in some respect through a separate trust fund. Any of these kinds of programs can be registered, and apprentices registered through any of them may work on public works. CAL. CODE REGS. tit. 8, §§ 230.1(a), 228(c) (1995). Nor does the definition of apprenticeship for purposes of applying the prevailing wage laws establish any employer

The convergent development of state and federal apprenticeship and prevailing wage statutes described above is currently reflected in the laws not only of the federal government and California, but of a majority of the other states as well. Thirty-two states have prevailing wage laws, with at least twenty-eight states restricting their sub-journey apprentice wage to apprentices in programs registered with or approved by the state or BAT. Cert. Pet. 8 n.2. Twenty-six states share federal State Apprenticeship Council ("SAC") status with California, Cert. Pet. 9 n.3, and in those states the administrative approval of apprenticeship programs is done by the states, albeit pursuant to federal standards.

III. Workers Who Were Not Registered Apprentices Were Paid Wages Below The Journey Level, In This Case.

The facts giving rise to the current dispute are as follows: In the Spring of 1987, the County of Sonoma

funding of apprenticeship as a condition of employing registered apprentices or paying them the apprentice wage.

Moreover, as interpreted by the CAC, CAL. LAB. CODE § 1777.5 does not prohibit unregistered "apprentices" from working on public works. Rather, the statute simply requires that any non-registered apprentice be paid at the appropriate journey-level rate for the class of work performed. CAL. CODE REGS. tit. 8, § 230.1(b) (1995). As written, CAL. LAB. CODE § 1777.5 requires that contractors, or their sub-contractors, become signatory to the standards of a joint apprenticeship committee and make contributions to the trust fund supporting the apprenticeship training of the committee. Neither of these requirements currently is in effect, nor were they at issue when this case was decided. CAL. CODE REGS. tit. 8, § 230.1 (1995).

awarded respondent Dillingham, as general contractor, a state-funded public works contract for building a detention facility. Pet. App. 25. On a public works project, payment of prevailing wages by all subcontractors is an element of the construction contract with the general contractor. CAL. LAB. CODE § 1771 (West 1989). Mr. Manuel Arceo, doing business as Sound Systems Media, was selected as a subcontractor on the job. R. 27, Decl. Arceo, ¶ 3.

In June 1988, after the contract was let, but before Arceo's on-site work began, Arceo entered into a multi-employer collective bargaining relationship with the National Electronic Systems Technicians Union. Pet. App. 26. Although the multi-employer bargaining unit did agree to apprenticeship standards on June 20, 1988 (R. 39, Decl. Lee, Exh. D, p. 032), no attempt was made to register the apprenticeship program until February, 1989. *Id.* at 25, 34 (date stamps). Moreover, before February, 1989, the new program would not have met the applicable standards had it applied for registration, because no arrangements had been made to provide any classroom training to the apprentices. R. 39, Decl. Lee, Exh. D, p. 028 at Article XI.⁶ Only in February, 1989, did the new

⁶ The federal standards, 29 C.F.R. § 29.5(b)(4) (1995), Pet. App. 72-73, as enforced by the state, CAL. LAB. CODE § 3074 (West 1989), CAL. CODE REGS. tit. 8, § 212(a)(3) (1995), require that apprenticeship programs provide "related and supplemental instruction" to apprentices. Upon approval of the standards, the program's registered apprentices meet the prerequisites to share in the approximately \$7 million allocated by California to the community colleges to underwrite "related and supplemental instruction." CAL. LAB. CODE § 3074.3 (West 1989) (prerequisite);

apprenticeship program at last secure the necessary letter of commitment for educational services from a community college. R. 39, Decl. Lee, Exh. D, p. 039.

The apprenticeship program finally filed its completed application for certification in February 1989, and was initially approved by the Chief of the Division of Apprenticeship Standards, after some necessary changes, in August. R. 39, Decl. Lee, Exh. D, pp. 032, 037, 038. Final approval by the CAC itself, the ultimate decision making authority where approval is contested, was delayed because of an appeal filed by another apprenticeship committee and was not effective until October, 1990.

Throughout the period of on-site work – both before and after the application for approval was first filed – Arceo employed construction workers and filed certified payrolls showing the pay rates for each craft, classification, or type of worker, and the actual amounts paid to each individual. R. 39, Decl. Lee, ¶ 2, Exh. E. Throughout that period, Arceo used the apprentice rate for certain workers even though those workers were not registered apprentices participating in an approved program.

IV. Proceedings Below.

When an audit showed that Arceo had paid workers at an apprenticeship rate who were entitled to be paid at the journey level, Dillingham received notice from the

CAL. EDUC. CODE §§ 8150-8156 (West 1994 and Supp. 1996) (apprenticeship reimbursements); Budget Act, 1995 Cal. Stat. 303, items 6870-101-001(a)-(b) (appropriation of \$6.99 million for FY 1995-1996).

state requiring that it withhold funds from subcontractor Arceo in order to pay Arceo's workers the difference between the wages they were paid and the amount they should have been paid. On receiving this notice, Dillingham and Arceo sued in federal district court for declaratory relief, alleging that California's requirement that workers on a prevailing wage project be paid at full journey level unless they are registered apprentices as defined by the state is invalid as preempted by both ERISA and the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.* (1994). Specifically pertinent here, Dillingham and Arceo claimed that the existence of Arceo's collectively bargained pay rate for apprentices, without more, established that workers paid that rate were "apprentices" in an ERISA-covered "plan, fund or program," and any state law setting wages for those individuals impermissibly "relates to" that purported ERISA plan within the meaning of section 514(a) of ERISA, 29 U.S.C. § 1144(a) (1994).

The district court rejected preemption arguments under ERISA and the NLRA,⁷ Pet. App. 39-40, 48-49. It held that California's regulation of apprenticeship programs is part of a cooperative state-federal effort for the formulation and promotion of apprenticeship programs, and is therefore saved from preemption by the Fitzgerald

⁷ The district court ruled that because state enforcement of minimum apprenticeship standards constituted a valid "minimum employment standard" they were not preempted by the NLRA under *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985) and *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1 (1987). The Ninth Circuit did not reach this issue and no cross-petition for certiorari was filed raising it.

Act, as incorporated in ERISA's savings clause, section 514(d), 29 U.S.C. § 1144(d) (1994).

The Ninth Circuit reversed, holding that the restriction of the apprentice prevailing wage to workers who were registered apprentices was preempted by ERISA on the following grounds:

1) California's application of its prevailing wage law to allow payment of the lower apprentice rate only to employees in "approved" programs had the effect and possibly the aim of encouraging participation in state approved ERISA plans while discouraging participation in unapproved ERISA plans. Pet. App. 14.

2) California law was not saved from preemption by the ERISA savings clause because, while the Fitzgerald Act does provide for state approval of apprenticeship programs, it does not depend on state law for enforcement, does not mandate apprenticeship programs and does not seek to discourage other types of training programs. In the view of the Ninth Circuit the Fitzgerald Act would not be impaired by preemption of this California law. Pet. App. 18.

In their unsuccessful petition for rehearing, petitioners noted that the Ninth Circuit opinion did not discuss at all this Court's then-recent decision substantially recasting the previous understanding concerning which state laws "relate to" ERISA plans. *New York State Conference of Blue Cross and Blue Shield et al. v. Travelers*, 115 S. Ct. 1671 (1995).

SUMMARY OF ARGUMENT

This case concerns California's apprentice wage on publicly funded construction projects. This wage is limited to registered apprentices in apprenticeship training programs which have been approved as meeting federal standards. The question in this case is whether ERISA preempts such a rule and requires the state to use a different definition of apprentice on its public works from that used by the federal government for federally funded works in California. California contends that creating such conflicting rules for contractors within the state is not required by ERISA preemption.

ERISA preemption embodies Congress' intent to spare employee benefit plans from conflicting state and local regulation. The difficulty comes from the unhelpful choice of terms used in the preemption clause. ERISA's preemption clause uses "relates to" as a term of limitation indicating that Congress only intended to preempt state laws that relate to ERISA plans. This text turns out to be unhelpful, as this Court pointed out in *Travelers* last term, because all laws stand in some relation to one another. Proper analysis of the statute and Congressional intent therefore requires more than the construction of a simplistic syllogism demonstrating that one law relates to another.

The California law in question is one at the intersection of three areas of traditional state concern: State public works and public contracting, state regulation of wages, and state approval of apprenticeship programs and promotion of apprenticeship. Preemption in areas of

traditional state regulation will come only after a showing of a clear and manifest intent of Congress. In this case there is no indication that Congress intended to require California to adopt a different rule for apprentice wages on state public works from that on federal works.

California law does not tell any ERISA plan what to do. Rather it tells contractors which workers may be classified as apprentices for pay purposes on public works. The definition California has chosen is the same as that used by the federal government. This choice has only an indirect economic effect on some ERISA plans. It provides an incentive to plans to meet the federal standards needed to obtain state approval of an apprenticeship program. The law does not command any particular benefit structure or form of administration. The problem is that whatever choice a state makes concerning a prevailing wage law, or an apprentice definition in such a law, the choice will in some sense "relate to" an ERISA plan. A state law will either promote apprenticeship or hinder it.

If the Court finds that the law in question does "relate to" ERISA plans, then California contends that the law is saved from preemption. The Fitzgerald Act expresses a congressional goal to promote apprenticeship and apprentice labor standards. This Act would be impaired by the preemption of California law, which recognizes only apprentices in programs meeting the Fitzgerald Act standards.



ARGUMENT

Under California's prevailing wage law, the state determines the minimum wages to be paid on public works jobs for each category of worker (carpenters, electricians, operating engineers, laborers, and so on), setting those wages at the level prevailing in the locality for that particular kind of work. Enforcing that scheme necessarily entails a governmental determination that the contractor is correctly classifying the worker in question. If contractors were free to define highly-skilled individuals who operate cranes as laborers, for example, and pay them laborers' wages, the overall scheme of the prevailing wage statutes would be fatally impaired. Poor quality and even dangerous construction work is the likely immediate result, since fully-qualified skilled workers are unlikely to take jobs at wages far below that prevailing for their craft.

Likewise, a state cannot meaningfully provide that apprentices are to be paid one wage and journey-level workers another absent some means of distinguishing apprentices from journey-level workers. It is for that reason that both federal and California prevailing wage laws have, since long before ERISA was enacted, defined the individuals who may be treated as apprentices for purposes of the prevailing wage law, rather than leaving the category for employer definition. (*See, supra*, pp. 8-9.)

I. ERISA Does Not Preempt California's Ability To Restrict Apprentice Wages To Registered Apprentices Because, Under *Travelers*, California's Law Does Not Relate To ERISA Plans.

The question in this case is whether Congress, in enacting ERISA, intended to displace the state's authority to set wages on its own public works jobs for *one* category of workers paid "their regular compensation directly by the employer" for productive work, like any other employee, *Massachusetts v. Morash*, 490 U.S. 107, 117 (1989), quoting Secretary of Labor, Notice of Proposed Rulemaking, 39 Fed. Reg. 422 (1974), by withdrawing the authority to determine which workers meet the criteria that justify paying them as apprentices and which do not.

A. *Travelers* Provides The Analytical Framework For Approaching The "Unhelpful Text" Of ERISA.

Last term *New York State Conference of Blue Cross and Blue Shield et al. v. Travelers*, 115 S. Ct. 1671 (1995), addressed a problem of statutory construction caused by the "unhelpful" text of ERISA, which preempts all laws which "relate to" employee welfare benefit plans. *Id.* at 1677. In cases where, as here, federal law is said to bar state action in fields of traditional state regulation, this Court has worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Travelers*, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

ERISA cannot be taken to mean that literally all laws which "relate" to ERISA plans are preempted, because as *Travelers* noted, in reality all things are in some fashion related to one another. 115 S. Ct. at 1677. In light of this unhelpful text, we must look to the "objectives of the ERISA statute as a guide to the scope of the state law Congress understood would survive," *id.*, as well as the purpose and effect of the state law in question. *Id.* at 1678.

Travelers first distinguishes the preemption treatment of those laws which explicitly refer to ERISA covered plans, see, e.g., *Mackey v. Lanier Collection Agency & Services, Inc.*, 486 U.S. 825 (1988), from those which do not. As we will show, this California law does not make reference to an ERISA plan.

Where the state law has only an indirect effect on an ERISA plan, *Travelers* directs us to determine Congress' intent concerning preemption. *Travelers* indicates that any state law whose only impact upon employee benefit plans results from the likely impact on plans of economic inducements or disincentives is to be preempted only in narrow circumstances – namely, where the "state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage," that law "might indeed be preempted." 115 S. Ct. at 1683 (emphasis supplied). Where, in contrast, the state law does not implicate the basic intent of the preemption provision – "to avoid a multiplicity of regulation in order to permit the nationally uniform administration of

employee benefit plans" – no preemption should be found. 115 S. Ct. at 1677-78.

B. California's Law Involves Areas Of Traditional State Regulation And Warrants The Strongest Presumption Against Preemption.

The California Labor Code provision here at issue comes to this Court with the strongest possible presumption against ERISA preemption because it lies at the intersection of three different "areas traditionally subject to local regulation," *Travelers*, 115 S. Ct. at 1683, and should therefore be declared preempted only upon the clearest showing that Congress intended this result.

One area is apprenticeship, which the history (discussed *supra* at pp. 2-6), shows has been a traditional state concern from colonial times. The second area is private sector wage regulation, that *Morash* recognized as a traditional area of state concern which ERISA was not intended to reach. Wage regulation standing alone is entitled to the "starting presumption that Congress did not intend to supplant state law." *Travelers*, 115 S. Ct. at 1676. The third area is state authority to generally regulate the wages and hours of those who work on state funded construction projects. See *W.W. Atkin v. State of Kansas*, 191 U.S. 207 (1903). The tradition of state regulation in this area is long, and modern state prevailing wages laws fall in this line of authority. (See, *supra*, at pp. 6-13.)

No claim is made here that ERISA preempts any one of these areas. Rather, it is their intersection in a rule that

defines an apprentice on a state public work as one registered in an approved program that is challenged. Apprenticeship laws have existed since the Elizabethan era, and have been a fixture in America since colonial times. States' general concerns with apprenticeship labor standards grew, first in administrative practice, then in legislation and regulation, into a state rule defining apprentices as those registered under federal standards. In the course of that growth, federal law specifically recognized and endorsed a strong state role.

By the 1920's, industry's needs and the progressive era's interest in popular education, child labor, and the creation of enforceable labor standards came together in the first comprehensive state laws to produce state "registration" and "apprenticeship standards" as formal aspects of "apprenticeship." The first comprehensive state law was enacted in Wisconsin in 1911 (amended 1923), followed by Oregon in 1931.⁸ Both these statutes expanded the common law based "indenture" of an apprentice to a master into the modern "written agreement," to clarify and expand what must be taught to apprentices. Both states specified what would be in an apprentice's "written agreement," together with requirements that such agreements incorporate trade group or multi-employer "schedules" of processes to be worked. These were the predecessors of what are now "apprenticeship standards." Each state defined "apprenticeship" under these new laws as a distinct method of training to

⁸ The statutes are reproduced in SCRIMSHAW at 237 App. A (Wisconsin) and 244, App. B (Oregon).

learn a trade.⁹ Each law had requirements that foreshadowed the modern "registration" of apprentice agreements.¹⁰ In short, these early laws expanded the role of the state from one focusing largely upon passive resolution of disputes to one involving active oversight of the quality of private supervision and training of apprentices.

In the early 1930's the federal government adopted and promoted the states' traditional apprentice registration requirements for apprentice standards, which set out minimum requirements for education and training, culminating in federal standards.¹¹ Executive Order 6750-C, Jan. 23, 1934, set up a Federal Committee which brought together industry groups, labor and local government for the first time on a national level. *See generally Safeguard* at 72.

⁹ Just as participation was marked by state approval, so too the certification of completion came from the state. SCRIMSHAW at 209-211 (Wisconsin) and Appendix B (Oregon).

¹⁰ Oregon provided that one was not participating in "apprenticeship" unless there was a written agreement, which had to be for a six month term. SCRIMSHAW at 247. (Oregon, INDENTURE STIPULATIONS, II Definitions, (1) the Apprentice). In Wisconsin there was a requirement that the term "apprenticeship" could not be used without a written agreement subject to the state law. SCRIMSHAW at 211, Wisconsin, Rule 10.

¹¹ The economic dislocation of the Depression inspired an unprecedented intrusion of the federal government into economic affairs by the mandatory industry "codes" of the National Recovery Act. Apprenticeship proved the exception to the federalization of economic relations with the states retaining a significant role. Apprenticeship's traditional voluntary character let the Committee's involvement in apprenticeship survive the demise of the N.R.A.

The Committee recommended and promoted basic national standards for apprenticeship in 1935. PATTERSON at 59, 64. In doing so the Committee outlined a five point program of apprenticeship regulation to be conducted in the states by state committees, including provisions on apprentice wages, length of term, continuous employment, on-the-job training and classroom education. *Safeguard* at 47 (report of the Committee), 23-25 (testimony of Rosenthal); PATTERSON at 40. In 1937, the Secretary of Labor published "Suggested Language for a Voluntary Apprenticeship Bill" drafted by the Committee that incorporated the five points of the 1934 proposal. ABBOTT, *supra*, at 247. The purpose of that suggested bill was to establish "conditions of apprenticeship which provide a fine standard of training, practically similar in all states." *Safeguard* at 23-25 (testimony of Rosenthal). The definition of an apprentice (*quoted supra*, n.3), both used by the federal government and promoted to the states, restricted the definition to someone covered by a written agreement registered with a State Apprenticeship Council (where no such Council exists, registration is with the Federal Committee on Apprenticeship). *Safeguard* at 73-74; PATTERSON at 78; DANAHER, APPRENTICESHIP PRACTICE IN THE UNITED STATES 7 (Graduate School of Business, Stanford University, Business Research Series No. 3, 1945) (Role of the Comm. on App.). Thus, portions of the Wisconsin and Oregon model definitions of apprenticeship became federal standards, and then spread to other states by way of the Federal Committee.

In 1937, in the Fitzgerald Act, Congress stated its intentions to promote state activity in the area of raising

apprentice labor standards. Congress used the terms "labor standards necessary to safeguard the welfare of apprentices," as well as "standards of apprenticeship" to describe what states were both to "formulate" and "promote." Those labor standards were to be included in "contracts of apprenticeship." The sponsor of the bill proposed that the Federal goal would be to protect labor standards generally, Pet. App. at 114, 117-119, and specifically to promote cooperation with the states.

MR. FITZGERALD. The bill sets up standards by Federal cooperation with the States and through the formation of voluntary committees in the States, throwing a cloak of protection around the boys and girls and setting up standards and protecting them and guaranteeing that when their time of service in a trade has expired, they will come out full-fledged mechanics. It also incorporates vocational education in the plants. Pet. App. at 114.

The hearings on the bill produced testimony that apprenticeship was distinct from other training because apprenticeship was under a written agreement and standards. Witnesses commended the Federal Committee's standards which were to apply to all endeavors defined as apprenticeship and distinguished between apprentices on the one hand, and helpers and short term learners on the other. One such distinction was that every apprentice should have 144 hours of classroom instruction; another that every apprentice should work under a written agreement or an indenture; and, finally, that every agreement should be approved by a third party who would act as

the arbiter of disputes. *Safeguard* at 72-75 (testimony of Patterson).¹²

The Department of Labor, charged with putting the Fitzgerald Act in effect, effectuated Congress' intent by setting up a partnership with the states around a common definition of "apprentice," based on approval of the apprentices' programs as meeting federal standards. By January 1, 1946, 16 states and Hawaii had enacted apprenticeship laws, and 9 states set up apprenticeship councils recognized by the federal government. PATTERSON at 43. Another 10 states had state apprenticeship councils without laws. PATTERSON at 68. The federal apprenticeship effort saw itself as a placeholder until states assumed their responsibilities to approve standards and register agreements. Once a state council was recognized, its authority to define "apprentice" was not only for state laws, but was also for federal wage laws.¹³ In the eyes of the Department of Labor, seeking recognition under the

¹² Patterson was likely to know Congress' intent to distinguish between other training and apprenticeship because he had been involved with the Federal Committee established by the Executive Order; had testified for the passage of the Act; and acted for the Secretary of Labor in the initial interpretation of the Act in the decade thereafter.

¹³ See, *supra*, n.3 and accompanying text. There was never a proposal to federalize the handling of apprentice complaints against contractors, or committees, despite the well recognized fact that, in any work or educational situation involving youth, disputes will arise. Misunderstandings were frequent in the old days of guild-apprentice agreements, as noted in RORABAUGH, and were dramatized on the stage. See GILBERT AND SULLIVAN, *PIRATES OF PENZANCE* (1880).

Fitzgerald Act was the first thing a state apprenticeship council should do.¹⁴

In sum, all three of the state concerns which intersect in California defining an apprentice as one registered under federal standards – protecting workers' wages, setting rules governing public contracting, and promoting effective apprenticeship programs – were areas of extensive and traditional state regulation long before ERISA was enacted. So too was the states' practice at issue here, the use of the federal definition of registered apprentice, and this use is entitled to a presumption against preemption.

C. California's Law Does Not Reference ERISA Plans.

The apprenticeship wage provision of section 1777.5 does not make the kind of clear and direct "reference to" employee benefit plans that has been fatal, without more, in a narrow group of cases. *Mackey, District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992), and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990).¹⁵

¹⁴ "Such designation means much because it indicates that the plan and standards of the council are in accord with the national scheme of apprenticeship. After the council has been officially recognized . . . it is in a position to act on all matters such as exemption from federal wage minimums, approving industrial establishments for apprenticeship, and carrying out the agreements made on a country-wide basis with management or labor organizations." PATTERSON at 69, 72.

¹⁵ While the Court held generally that a direct reference to ERISA plans, without more, can trigger ERISA preemption, it is noteworthy that in none of the cases did the Court's analysis

California's Labor Code section 1777.5 does not make reference to any employee benefit plan. It provides that contractors, not apprenticeship programs, may pay a lower wage to registered apprentices on public works. The law does not require any employee benefit plan to do anything, or to have any particular structure or form of administration.¹⁶ The law is not predicated on the existence of an employee benefit plan.

California defines a "registered apprentice" as one working under "apprenticeship standards" and "written apprentice agreements." CAL. LAB. CODE Section 1777.5. Pet. App. 58-63. By cross reference to the definition of apprentice in Labor Code section 3077, those standards and written agreements are to be part of "an approved program" of training and education.¹⁷ However, such an apprenticeship

end with the observation that there was such a reference. Rather, the Court in each instance looked for, and found, other significant indications either that Congress must have intended preemption because of other provisions in ERISA addressing the same issues as the state law (*Mackey and Ingersoll Rand*), or that the state law in question had a direct and significant burden upon ERISA plans (*Washington Board of Trade*).

¹⁶ This is in contrast to state rules determining when a sponsor may create a plan, or submit an existing plan for approval. Such rules, aimed directly at plans, raise very different ERISA concerns. See, e.g., *Associated General Contractors v. Smith*, 74 F.3d 926 (9th Cir. 1996). All parties concede such direct regulation is not at issue here. There was no challenge below to the approval process or the standards applied. Such an issue of state law directly referring to a plan is not present here because, in the proceedings below, the new apprenticeship program's sponsor did not challenge the state approval process.

¹⁷ Under *Electrical Joint Apprenticeship Comm. v. MacDonald*, 949 F.2d 270 (9th Cir. 1991), cert. denied, 505 U.S. 1204 (1992) and

"program" is not the same thing as an ERISA-covered apprenticeship plan. Some employers provide unilateral apprenticeship training under approved standards without ever creating an ERISA covered benefit plan. In Wisconsin, with a long-established apprenticeship tradition, immediately before ERISA apprenticeship committees "seldom" had financial support.¹⁸ Department of Labor regulations make clear that "neither on-the-job training nor classroom training paid for out of an employer's general assets is an ERISA plan." 29 C.F.R. § 2510.3-1(b)(3)(iv) (1995); 29 C.F.R. § 2510.3-1(b) (1995); 29 C.F.R. § 2510.3-1(k) (1995); 40 Fed. Reg. 24,643 (1995); ERISA Advisory Opinions Nos. 76-01 and 83-32A.

The program standards which must be approved describe the selection and training requirements and working conditions for apprentices. They include provision for related instruction, on-the-job supervision, review of the apprentice's progress, progressively increasing wages, an outline of the work processes in which the apprentice is to be trained and a procedure for the resolution of disputes. See similar definitions in CAL. CODE REGS. tit. 8 § 205(f) (California definition) and 29 C.F.R. § 29.5 (federal definition). These program standards apply regardless of whether the program is ultimately provided by an ERISA plan, and therefore the statute cannot be said to make reference to ERISA plans.

Southern California ABC v. California Apprenticeship Council, 4 Cal. 4th 422, 14 Cal. Rptr. 491 (1992), the state may not impose additional criteria for approval. California does not dispute that it may not impose such requirements for approval beyond the categories set out in the Fitzgerald Act regulations defining apprenticeship standards.

¹⁸ CENTER FOR STUDIES IN VOCATIONAL AND TECHNICAL EDUCATION, RESEARCH IN APPRENTICESHIP TRAINING 86 (1967) ("78 percent of them have no source of financing").

D. This Law Has A Permissible Purpose And Effect Which Congress Did Not Intend To Pre-empt.

Since the Labor Code's use of the term "registered apprentice" is not a direct reference to an ERISA plan, under *Travelers* we must undertake a fuller analysis of the purpose and effect of the law. On examination we find that the term "registered" apprentice is needed to define those less skilled workers who may be paid the lower apprentice wage on a public construction project. This law has a *direct* and purposeful connection to the payment of wages and the employment of workers on public works projects. Therefore, under *Travelers*, the question becomes adducing the intent of Congress. We must ask whether there are any specific indications "in the language of [ERISA] or the context of its passage [that] indicates that Congress chose to displace [*here state registered apprentice wage rates*], which historically has been a matter of local concern." (bracketed material added) 115 S. Ct. at 1680.

At the time of ERISA's passage, the partnership between the states and the federal government under the Fitzgerald Act had been in existence for 40 years. Both the longevity of this partnership and the federal policy behind it suggests that Congress would not have intended to overturn the states' ability to define an apprentice on a public works project by reference to registration, without any mention of such an intent in ERISA or its legislative history.

State registration of apprentices proved useful for advancing other congressional goals, in addition to its

original Fitzgerald Act goal of improving labor standards for apprentices. In such extensions, Congress assumed that the states would continue to exercise their authority to approve programs meeting federal standards, and the Department of Labor would continue to encourage the states to do so. Congress' earliest expansion of the use of registered apprentice as a benchmark for some level of quality in training was the contribution to the training effort during the Second World War, *PATTERSON* at 134-144, followed by efforts to include returning veterans to the skilled labor market, *id.*; currently 38 U.S.C. §§ 3108 (benefits), 3452(e) (apprenticeship to be one approved by BAT or states) (1994). Other statutes included apprenticeship, defined as conforming with federal standards by state or BAT recognition, as one of the ladders for the economically displaced, unskilled or dependent to leave poverty.¹⁹

In *Travelers* this Court observed, concerning states' efforts to control medical costs with federal encouragement, that Congress was unlikely to have undone such

¹⁹ The Carl D. Perkins Vocational Education Act and the Applied Technology Act Amendments of 1990. 20 U.S.C. §§ 2301, 2323 (state plan), 2471 (federal or state registration of apprenticeship programs) (1994); The School to Work Opportunities Act. 20 U.S.C. §§ 6101, 6103(13), (14) (federal or state registration of apprenticeship programs), 6123 (state plan), 6143 (state plan), 6145 (sub-grants to local partnerships) (1994); The Adult Education Act. 20 U.S.C. §§ 1211(b) (literacy programs for commercial drivers), 1211(c), (e) (approved apprenticeship training program, as defined by the National Apprenticeship Act) (1994); Vocational Training for Adult Indians. 25 C.F.R. § 27.8 (1995) (federal or state approval of apprenticeship program); Job Training Partnership Act. 29 U.S.C. § 1501, *et seq.* (1994).

efforts without significant mention in the legislative history of ERISA. 115 S. Ct. at 1681. The federal state partnership under the Fitzgerald Act is at least as extensive, and is based on older and more explicit Congressional intent. It seems very unlikely that Congress would have undone the partnership between business, labor and a majority of states in its own apprenticeship effort, then over 40 years old, without some extensive discussion and debate. Yet, practically the only discussion in the record is a sentence from Representative Dent addressing a minor point concerning reporting requirements for apprenticeship plans indicating an intent that the Secretary of Labor minimize ERISA's impact on reporting requirements for such plans: "We clearly expect the Secretary of Labor to continue his present policies with respect to such plans, and exempt them from the reporting requirements unless a clear reason for changing that policy is shown." 120 CONG.REC. 29197 (1974) (remarks of Rep. Dent). See also 120 CONG.REC. 29932 (remarks of Sen. Williams). If Representative Dent showed knowledge and concern about ERISA's impact on this relatively minor operational aspect of apprenticeship, then had the intent been to undo 40 years of practice, it is likely he or some other member would have made extensive comments.

The Secretary of Labor, charged with both Fitzgerald Act and ERISA responsibilities, issued regulations which assume that the states' traditional role of promoting apprenticeship and registering apprenticeship programs meeting federal standards was both to continue and was to be encouraged. The regulations were pending during consideration of, and were enacted just after passage of, ERISA. Given the role of the Secretary of Labor as

administrator of both the Fitzgerald Act and ERISA, promulgation of the 1973-1977 Fitzgerald Act regulations is a close and informed view of Congress' understanding of the propriety of states' continued use of the federal-state partnership's definition of apprentice. The regulations formalized the standards previously suggested to the states. They also regularized the recognition, which had existed since at least 1938,²⁰ of the state as the agency to define who was a registered apprentice for various federal labor standards which treated apprentices differently from those in less formal training.

These regulations were adopted in 1977 without any indication in the comments in the *Federal Register*, Pet. App. 94-106, that ERISA had just preempted the states' ability to use this common definition of an apprentice for state purposes. It seems extraordinarily unlikely that the Secretary of Labor, who enforces ERISA, would be promulgating regulations inviting more states to become approved to "register" apprentices if he understood that Congress had just preempted its use by ERISA.

E. Congress' Purpose For ERISA Suggests Positive Reasons Why States Should Retain the Ability to Recognize "Registered" Apprentices.

Finally, as in *Travelers*, the overall purpose of ERISA is a further source of guidance as to whether Congress

²⁰ In addition to the federal acts cited *supra* n.19, see regulations applicable to employment of apprentices pursuant to § 14 of the Fair Labor Standards Act, 29 C.F.R. §§ 521.1 - 521.11 (1995).

intended via the general, vague language of the preemption clause to preempt a state prevailing wage for registered apprentices. Cf. 115 S. Ct. at 1677. ERISA was intended, in part, to protect the interests of workers in actually receiving benefits from employee benefit plans. *Morash* at 1673. To require California law to recognize all training plans as though they meet the same standards as approved apprenticeship programs would hardly serve that purpose, and would make it more likely that some workers who thought they were apprentices would receive only the low apprentice wages, with little or none of the on-the-job training or related instruction which apprentices are to receive in federally defined apprenticeship.

ERISA was intended to allow for uniform plan structure and administration. Allowing states to use the federal definition of "registered apprentice" does not introduce the kind of lack of uniform treatment of plans which ERISA sought to prevent. The Fitzgerald Act regulations provide the states with criteria for evaluating an apprenticeship program, since meeting the federal requirements is also California's criteria for approval of a program. The only variation is the need to have work process standards which accurately reflect the local construction practices and building codes. For example, an apprentice in California will be learning earthquake specific construction technique, and school-based training in California will also depend on local conditions, like the accessibility of the school.²¹ Both are inevitable sources of

²¹ Indeed, while the Fitzgerald Act regulations provide for some reciprocity in program approval, that reciprocity does not

variation arising from local background differences, just as hospital rates in *Travelers* varied, independent of the state law in question.

F. The Indirect Effect That Section 1777.5 Has On ERISA-Covered Apprenticeship Programs Does Not Force Any Particular Plan Structure.

As we have shown, the California law does not directly make reference to ERISA plans, but serves purposes which are crucial if the state is to maintain an effective and fair prevailing wage system. The California statute does, however, have an indirect economic effect on apprenticeship programs. In *Travelers* we are told that if a "state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage," that law "might indeed be preempted." 115 S. Ct. at 1683 (emphasis supplied). That is not the case here. The indirect economic effect in this case arises only from the possibility that the existence of the lower apprentice wage will provide an incentive to some unregistered training programs to try to include the federal substantive provisions needed for approval. Such approval makes apprentices registered in the program more attractive workers on state and federal public works projects. A better program meeting higher labor standards may cost its sponsors more. A contractor who is considering an

extend to programs in the building and construction industry. 29. C.F.R. § 29.12(b)(8) (1995). Pet. App. 101-104.

apprenticeship program and who wishes to work on public works projects may wish to incur the increased cost of this higher level of training because of the ability to pay the apprentice wage on public works.

The fact that an apprentice wage break may provide an incentive to a subset of ERISA-covered programs to become approved by meeting federal standards has the kind of indirect economic effect on an ERISA plan which is not preempted under *Travelers*. This is so because, as discussed above, the state law limiting the apprentice wage to registered apprentices serves a legitimate purpose of maintaining the integrity of prevailing wage classifications and because it is the sort of preexisting area of regulation which survives absent a "clear and manifest" purpose by Congress to preempt. *Travelers* at 1676.

The California law in question presents an example of the kind of situation where the text of ERISA is unhelpful. The state must of necessity define "apprentice" in some way if the state is to regulate wages on state funded public works projects.²² Any prevailing wage law will "relate to" apprenticeship, either by accommodating apprenticeship by defining those who can be paid less, or by impeding the use of apprentices on public building projects by requiring all workers to be paid at journey level rates. Consequently a prevailing wage law whose

²² This is similar to the problem facing a state concerning value added tax laws. Such a law must define compensation in some way and some methods will mention ERISA covered benefits. See *Thiokol Corp., Morton International, Inc. v. Roberts*, 76 F.3d 751, 754-755, 759 (6th Cir. 1996).

primary purpose is to set journey level wages cannot be neutral as to its effect on the use of apprentices.

Absurd results can follow even when a state with a prevailing wage law accommodates an apprentice wage, as most do. The law must contain a definition of apprentice and there are limited alternatives. One alternative is to allow a contractor to unilaterally determine which workers will be paid the lower apprentice wage. Given that public works are nearly always required to be awarded to low bidders, this temptation would, in all likelihood, rapidly expand the number of persons paid as apprentices beyond the wildest dreams of those in Congress who passed the Fitzgerald Act to promote apprenticeship. Cf. *Building and Const. Trades v. Donovan*, 712 F.2d at 625 (prevailing wage laws can be subverted by arbitrary classifications). Contractors must be able to bid on public works without concern that a competitor will have an unfair advantage in the bid process by using wage rates premised on the availability of an unlimited number of phony apprentices.

A second possibility is for each of the 28 states with "apprentice wages" to make up its own definition of apprentice. That would hardly harmonize with Congress' goal in ERISA of eliminating conflicting state regulation since 28 states could come up with 28 unique definitions, some imposing criteria above the federal standard and others below. This approach would further complicate matters within the state because the Davis-Bacon Act and regulations, requiring the payment of prevailing wages on federally funded public works, restricts the apprentice wage to apprentices registered under federal standards. 29 C.F.R. § 5.5(a)(4) (1995). This could set up conflicting regulation both within a state and between states.

A third approach, used by California since the 1930's, is to use the same definition of apprentice on state public works as that used on federally funded public works subject to Davis-Bacon. The approach serves the purpose of conforming the state practice on state public works with the practice on federally funded public works, which simplifies things for contractors who bid on public works. This is especially useful since projects will sometimes acquire a federally funded character although initially planned as state funded. This third approach does not produce the kind of "conflicting" state law that Congress intended to preempt.

Thus, the states' near uniform practice of having apprentice rates in their prevailing wage laws and, when faced with the need to define an apprentice, their practice of adopting the federal definition of "registered" apprentice, has the kind of indirect economic effect on some ERISA-covered "plans, funds or programs" that Congress would not have understood to "relate to" them as that term is used in ERISA's preemption clause, § 1144(a).

II. The ERISA Federal Savings Clause Protects California's Law Which Carries Out The Goals Of The Federal-State Apprenticeship Scheme Under The Fitzgerald Act.

ERISA's federal savings clause ("savings clause"), § 514(d), 29 U.S.C. § 1144(d), reflects the fact that ERISA was not a deregulation of pension and welfare plans, compare, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374

(1992), but rather an attempt to establish plan regulation "as exclusively a federal concern." *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504, 524 (1981). The savings clause provides that all other federal laws (except as specifically excepted) and all federal regulations and rules shall be preserved and not "alter[ed], amend[ed], modif[ied], invalidate[d], impair[ed], or supersede[d]" by ERISA.

One such federal law is the Fitzgerald Act of 1937, enacted to promote and extend labor standards necessary to safeguard the welfare of apprentices. As demonstrated earlier, Congress intended to accomplish this goal in large part by supporting and encouraging state programs for promoting apprenticeship. (*See, supra*, pp. 25-29.)

The Fitzgerald Act is the authority for the national apprenticeship regulations and rules issued in 1977. These regulations formalized the national policy on apprenticeship, and were designed to "set forth labor standards to safeguard the welfare of apprentices," and to "extend the application of such standards" both by formally clarifying the content of "standards" and written agreements, and by establishing a uniform set of procedures for registration of programs by state apprenticeship agencies, valid for multiple federal purposes. 29 C.F.R. § 29.1(b) (1995). In those 26 states approved under these regulations as State Apprenticeship Council states, the regulations avoid the need for a duplicative federal bureaucracy in an area of traditional state involvement.

Shaw v. Delta Airlines, 463 U.S. 85 (1983) recognized that where the federal scheme itself incorporates a role for the states, the savings clause necessarily protects that role from preemption; if it did not, then the federal law would certainly be "impaired" and "modified" by ERISA.

The Ninth Circuit held that the savings clause is not applicable here because, under *Shaw*, that clause serves to preserve state enactments only to the extent that there is a federal *enforcement* scheme that depends on state laws, i.e., if the state role under federal law is other than enforcing a federal requirement, the savings clause is inapplicable. *Shaw*, however, demonstrates that the determination of whether displacing a certain state law impairs federal law instead turns on analysis of the particular statutory scheme. *Shaw* concerned the joint federal-state enforcement effort set forth in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

First, in analyzing Title VII, *Shaw* concluded that because of "the importance of state fair employment laws to the federal enforcement scheme, preemption of the Human Rights Law would impair Title VII to the extent that the Human Rights Law provides a means of enforcing Title VII's commands." 463 U.S. at 103-04. *Shaw* makes clear that the savings clause can protect state efforts where the states are not mandated to take action under federal law but do so voluntarily. *Shaw* noted that the federal agency that enforces Title VII depends on the states as willing partners in enforcing Title VII's non-discrimination provisions. Even though an employee would still have remedies through the EEOC, preemption would disrupt the joint federal-state enforcement scheme both because the EEOC workload would dramatically

increase and because there would be a less effective enforcement of Title VII. *Id.* at 103 n.23 and accompanying text. Either result constitutes sufficient "impairment" to invoke the savings clause.

In apprenticeship, likewise, the savings clause protects the states' actions in furtherance of the federal-state partnership embodied in the Fitzgerald Act. While the Fitzgerald Act affirmatively promotes apprenticeship and encourages the states to do so, and Title VII simply prohibits discrimination, that distinction is not significant because the savings clause speaks of "*any* law of the United States." The pertinent point is that *Shaw* found that the joint enforcement scheme was saved, including the states' efforts to promote access to redress for discrimination.

Second, *Shaw* also held that state discrimination laws prohibiting conduct not otherwise unlawful under Title VII are not saved from preemption. 463 U.S. at 103-04. But that holding was based on the fact that Title VII itself did not provide any general role for the states in promoting fair employment practices, but instead depended on state aid only in enforcing Title VII norms. 463 U.S. at 103. There is no indication in *Shaw* that the savings clause does not protect a federal scheme from impairment where a federal statute declares that the state role surpasses simple enforcement of federal standards, and encompasses as well state activities designed to affirmatively promote use of those federal standards.

For the following three reasons, the federal-state partnership embodied in the Fitzgerald Act's scheme and

that statute's articulated goal of promoting the furtherance of labor standards necessary to safeguard the welfare of apprentices would be profoundly impaired if state prevailing wage laws cannot distinguish between registered apprentices in programs which meet federal standards and unregistered apprentices.

1. Because government contracting rules normally require awards to the lowest bidder (JAMES ACRET, CALIFORNIA CONSTRUCTION LAW MANUAL 283 (4th ed. 1990)), transferring the state's authority to define apprentices to any contractor willing to set up an ERISA plan and use the name apprenticeship would set in motion a labor market distortion ruinous to the expressed congressional goals of the Fitzgerald Act and its implementing regulations. Such a judicially created rule makes it impossible for states to recognize any cost disadvantages to contractors who train apprentices up to the federal standards, and invest the supervisory and journey worker time for on-the-job training.

Under such a rule, a competing contractor can pay a lower apprentice wage to any worker whom he places in a generic unapproved program, which is less costly because it has no objective training standards, is thrown together for a single contract, lacks outside schooling or safety training, and allows an unlimited number of apprentices to work regardless of whether journey level workers are present to provide on-the-job training, but is covered by ERISA.

Because of this, if states cannot limit the apprentice rate on public works jobs to apprentices in registered programs, then their apprentice wage break will deprive

contractors who participate in registered programs, and their registered apprentices, of work opportunities. The effect of such a regime would be to *discourage* not encourage the inclusion of federal apprenticeship standards in contracts of apprenticeship.

2. In the long run, an equally severe impairment of the Fitzgerald Act and its implementing regulations will result from lower construction quality corresponding to the lower skill level of the work force caused by lower standards of training. With no guarantee of the quality of training, the state will have little incentive to pay contractors for unskilled work on the state's own projects. Although apprentices registered in state approved programs are, by definition, less skilled than the journey level workers, they are at least overseen by journey level workers on the state job and participate in ongoing classroom instruction. 29 C.F.R. § 29.5(b)(9) (1995). Unskilled workers in ad hoc informal programs, on the other hand, are not necessarily provided such supervision, and may produce work that is unsound or even dangerous. The states have been willing to allow apprentices to work on publicly funded projects although they are less skilled than journey level workers, since at least the contractor has a self-interest in teaching the apprentices to work up to high standards because the contractor must live with the consequences of the teaching beyond the one state-funded public work.

The likely result of preemption is that states will simply eliminate the apprenticeship wage on public works projects, thereby vastly constricting the on-the-job training opportunities for apprentices generally. Again,

such a result directly "impairs" the operation of the federal apprenticeship program by limiting the available training.

3. Additionally, if the 26 states that now voluntarily undertake the investigation, registration, and approval of programs authorized by BAT cannot use the resulting certification for any state purpose whatever (including, for example, determining which apprenticeship programs should receive state funds to support their educational programs), there remains little reason to devote state resources to so modest a role. Rather, if states are limited to the role of registrar for the federal government under Davis-Bacon and other statutes, then states may well find other more pressing uses for limited public resources.²³

The Fitzgerald Act and the cooperative scheme which its regulations create would be impaired if the states no longer volunteer for the apprenticeship registration work. Were the states to turn all apprenticeship responsibility to the federal BAT, the transfer would dramatically increase the scope of federal responsibility. The scope of the resulting additional burden on the federal government would be considerable.²⁴ Such a transfer of registration

²³ California also provides just under seven million dollars in support of the education of registered apprentices in the community college system. (*See, supra*, n.6.) It is unlikely that this financial support would continue if California were precluded from making any state law use of the registration concept and criteria.

²⁴ In California in 1991 the BAT had four professional staff to oversee 3,099 apprentices, while California's DAS had 79 professional staff and 47,663 apprentices. G.A.O., APPRENTICESHIP

responsibility to the federal government would directly impair both the general purpose of the Fitzgerald Act to encourage apprenticeship and the specific purpose of the Secretary's regulations, to establish and rely on state registration agencies.

Beyond the Fitzgerald Act, preemption would impair several other federal statutes, and future responses to the need for more effective training of skilled workers. The Davis-Bacon Act would be impaired. Davis-Bacon rules restrict the wage break on federal public works jobs to registered apprentices in approved programs. A different rule for state projects would create the absurd situation that ERISA, in the name of uniform administration for plans, creates one set of rules for a contractor working on a federal courthouse or jail and another set of rules when that same contractor goes across the street to wire the sound security system in, as here, the county jail. The complexity and absurdity of the pay classification problems for contractors would be magnified when a project which begins as state funded acquires federal support, and with that support, a different set of rules concerning apprentice wages. Also, once training slots are no longer reserved for registered apprentices on state public works jobs, their advancement in their craft will be vastly slower, creating a situation where, on federal public works jobs, the work of apprentices will be less skilled and the burden on contractors to provide training to them much greater.

TRAINING ADMINISTRATION, USE, AND EQUAL OPPORTUNITY, 20 (1992) (Staff); J.A. 96 (number of apprentices in 1990).

Additionally, numerous other federal laws depend on state registration of apprentices as a quality guarantee for the allocation of benefits or exceptions to regulations. (See, *supra*, n.19.) For example, veterans benefits are provided to veterans training in "registered" apprenticeship programs. 38 U.S.C. § 3687 (1994). If the states pull back from the registration process, or fail to encourage job opportunities for registered apprentices, all these laws, unrelated to benefit plans, will be impacted.

If states lose interest in apprenticeship at the time that apprenticeship is emerging as a critical educational tool, it will impair efforts to ready the American work force for the 21st century. See *Education Goals and Standards: Examining the Need to Improve National Education and Job Training Opportunities Before the Senate Comm. on Human Resources*, 103d Cong., 1st Sess. 13 (1993) (Secretary of Labor Robert Reich). Even as Congress considers returning more authority in the area of job training and education to the states, pending legislation, H.R. 1617, nonetheless Congress continues to focus on federal standards by relying on "registered apprenticeship programs." It is one method of assuring that federal money will not be channeled into worthless programs providing job training in name only and for the benefit of the program's organizers, rather than the trainees. *Id.* H.R. 1617, 104th Cong., 1st Sess. §§ 5, 107(f)(H); 110(p)(3)(E); 241(c)(6); 323(b)(3)(A)(II) (1995).

The Fitzgerald Act and the Secretary's regulations provide a model for a federal-state partnership that promotes but does not mandate.²⁵ Where the states, as here, are participating in an explicit partnership to carry out federal policy, based on express congressional intent, and decades of administrative practice, the states are not acting as interlopers. Elimination of the state role in apprenticeship would be devastating to the federal policy because of the effect it would have not only in increasing a federal workload, but also in transforming a partially state-based system into an entirely Washington-based system.



²⁵ In this respect it is similar to the cooperative relationship in the area of bankruptcy exemptions, in which the federal system depends on the state having its own exemption. State laws relating to the exempt status of pension funds have been held not preempted. *In Re Schlein*, 8 F.3d 745, 753 (11th Cir. 1993) (the bankruptcy law relies on state law to assist in the implementation of the policy choices made by Congress).

CONCLUSION

This Court should reverse the decision of the Ninth Circuit.

Dated: June 17, 1996, San Francisco, California

Respectfully submitted,

JOHN M. REA, Chief Counsel
(Counsel of Record)

VANESSA L. HOLTON
Asst. Chief Counsel

FRED D. LONSDALE
Sr. Counsel

JAMES D. FISHER, Counsel
SARAH COHEN, Counsel

State of California
Department of Industrial
Relations
Office of the Director
Legal Unit
45 Fremont Street, Suite 450
San Francisco, CA 94105

(Mailing Address:
P.O. Box 420603
San Francisco, CA 94142)
(415) 972-8900

*Counsel for State Petitioners
Department of Industrial
Relations Division of
Apprenticeship Standards*

H. THOMAS CADELL, JR.
Chief Counsel
RAMON YUEN-GARCIA
Counsel

State of California
Division of Labor
Standards Enforcement
45 Fremont Street,
Suite 3220
San Francisco, CA 94105
(Mailing Address:
P.O. Box 420603
San Francisco, CA 94142)
(415) 975-2060

*Counsel for State
Petitioners Division of
Labor Standards
Enforcement and County
of Sonoma*